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SUPREME COURT OF THE UNITED STATES.

No. ~~177~~. 349 & 350

WILLIAM WALKER & S. F. SLATTER, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT U. S. FOR THE EASTERN DISTRICT OF LOUISIANA.

G. S. GIDEON, Printer, No. 511 Ninth street, Washington, D. C.

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SUPREME COURT OF THE UNITED STATES.

No. 177.

WILLIAM WALKER & S. F. SLATTER, PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE CIRCUIT COURT U. S. FOR THE EASTERN DISTRICT OF LOUISIANA.

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Gideon, Print.

Transcript.—Case of United States vs. William Walker et al.—No. 2,826.

Affidavit for Arrest.—Filed 11th Nov'r, 1857.

UNITED STATES OF AMERICA,
Eastern District of Louisiana.

Before the undersigned, judge of the United States district court for the aforesaid eastern district of Louisiana, personally came and appeared P. E. Walden, Henry Crane, and O. H. Polk, who being duly sworn, do depose and charge that, from information received, they do verily believe, that on the tenth day of November, 1857, and previously thereto, Wm. Walker has, within the territory and jurisdiction of the United States, to wit, within the aforesaid district, begun and set on foot a military expedition and enterprise, to be carried on from the territory and jurisdiction aforesaid against the territory and dominions of the states of Costa Rica and Nicaragua, and of the people thereof—states and people with whom the United States are and were, during such alleged acts, at peace—contrary to the form of the statutes of the United States made and provided, and against the peace and dignity of the same.

And the said P. E. Walden, Henry Crane, and O. H. Polk do further, on oath, from information received, they do verily believe and charge, that on the tenth day of November, 1857, and previously thereto, the said Wm. Walker has, within the territory and jurisdiction of the United States, to wit, within the aforesaid district, provided and prepared the means for a military expedition and enterprise, to be carried on from the territory and jurisdiction aforesaid, and from the United States, against the territories and dominions of states and people with whom the United States are and have been, during the preparing and providing aforesaid, at peace, to wit, the states and people of Nicaragua and Costa Rica, contrary to the form of the statute of the United States in such case made and provided, and against the peace and dignity of the same.

Wherefore deponents pray that the said William Walker be arrested and dealt with according to law.

(Signed) O. H. POLK,
(Signed) P. E. WALDEN.
(Signed) HENRY CRANE.

Sworn to and subscribed before me, this 10th day of November, 1857.

(Signed) THEO. H. McCALEB,
U. S. Judge.

Writ of Arrest and Marshal's Return.—Filed Nov'r, 1857.

UNITED STATES OF AMERICA.

UNITED STATES }
vs. }
WM. WALKER. }

Charged, *made* act of Congress April 20th, 1818, with beginning, setting on foot, and preparing within the United States a military expedition against the territories and dominions of states of Nicaragua and Costa , with whom United States are at peace.

The President of the United States of America to the Marshal of the eastern district of Louisiana, or his lawful deputy, greeting:

You are hereby commanded, in the name of the United States of America, and of the circuit court of the United States for the 5th circuit and eastern district of Louisiana, to arrest the body of the defendant, Wm. Walker, and him confine till he shall give sufficient security that he shall not depart from said State without the leave of our said court.

Witness the Honorable R. B. Taney, Chief Justice of the Supreme Court of the United States, this day of November, in the year of our Lord one thousand eight hundred and fifty-seven, and in the 81st year of the independence of the United States.

(Signed) THEO. H. McCALEB,
U. S. Judge.

(Endorsed:) The United States vs. W. Walker.

U. S. Marshal's Return.

Received Nov'r 10th, 1857, at about 9 o'clock p. m.; and on the 10th November, 1857, at about 10 o'clock p. m., I arrested the body of the said defendant, William Walker, and brought him before the Hon. Theo. H. McCaleb, U. S. judge in and for said district, when the said William Walker was released on bail by order of the said Hon. Theo. H. McCaleb, U. S. judge.

This writ returned, executed as above.

New Orleans, Nov'r 11th, 1857.

(Signed) EMILE MARY,
Dep. U. S. Marshal.

Recognizance.

Minutes.—November Term, 1857.

New Orleans, Wednesday, 11th November, 1857.

Court met pursuant to adjournment. Absent, Hon. J. A. Campbell, presiding judge; present, Hon. Theo. H. McCaleb, district judge.

THE UNITED STATES
vs.
WILLIAM WALKER.

The defendant, William Walker, having entered into recognizance before Hon. Theo. H. McCaleb, U. S. district judge, for his appearance before the court on this day, to answer to a charge made against him of beginning, setting on foot, and preparing within the United States a military expedition against the territories and dominions of the states of Nicaragua and Costa Rica, with whom the United States are at peace, in violation of the provisions of the act of Congress of the 20th April, 1818, appeared in court, in answer to the same. Whereupon it was ordered that he be recognised to appear before this court on Saturday, the 17th of November instant, at 10 o'clock a. m., with S. F. Slatter as his security, in the penal sum of two thousand dollars.

Minutes.—November Term, 1857.

New Orleans, Wednesday, 11th November, 1857.

Court met pursuant to adjournment. Absent, Hon. J. A. Campbell, presiding judge; present, Hon. Theo. H. McCaleb, district judge.

THE UNITED STATES
vs. } 2,826.
WILLIAM WALKER.

Appeared this day, in open court, William Walker, defendant herein, who, as principal, and S. F. Slatter, who, as security, did acknowledge themselves each held and firmly bound unto the United States of America in the sum of two thousand dollars, ($2,000 $\frac{}{100}$;) for the payment of which they bound themselves, their heirs, and administrators, respectively, subject to the following conditions: That if he, the said principal, William Walker, shall appear before this court on Tuesday, the 17th day of November instant, at 10 o'clock a. m., and from day to day and from term to term thereafter, until duly discharged, to answer to such complaint as may then and there be made against him on a charge of beginning, setting on foot, and preparing within the United States a military expedition against the territories and dominions of the states of Nicaragua and Costa Rica, with whom the United States are at peace, in violation of the provisions of the act of Congress of April 20th, 1818, and shall not depart without leave of the court, and shall comply with and abide by such judgment or sentence as may then and there be pronounced against him, then this obligation to be void; else to remain in full force.

Motion for Forfeiture of Recognizance.

Minutes.—November Term, 1857.

New Orleans, Tuesday, 17th November, 1857.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, J. A. Campbell, presiding judge.

THE UNITED STATES
vs.
WILLIAM WALKER.

The defendant herein, having entered into recognizance for his appearance before the court, on this day was duly called; and thereupon Pierre Soulé, esq., appeared in court and claimed the right, as the attorney and counsel of the said defendant, to represent and appear for him in answer to his recognisance.

S. F. Slatter, the surety upon the recognizance, was then duly called to produce in court the body of the said William Walker; and thereupon the said S. F. Slatter appeared and answered, "that he now produces the said William Walker, by his counsel, Pierre Soulé, esq."

The defendant not appearing in person, after due call, F. H. Clack, esq., U. S. attorney, moved that the recognizance of the said William Walker be declared forfeited, and that judgment be entered thereon. Pierre Soulé, esq., of counsel for the said defendant, expressed his desire to be heard in opposition to the said motion. Whereupon it was ordered that the said motion be assigned for argument for Friday, the 27th instant, at 10 o'clock a. m.

Argument and Submission.

Minutes.—November Term, A. D. 1857.

New Orleans, Monday, 14th Dec'r, 1857.

Court met pursuant to adojurnment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

THE UNITED STATES
vs.
WILLIAM WALKER. } No. 2,826.

The motion herein made, to have declared forfeited the recognizance herein entered into by the defendant, and to have judgment entered thereon, came on for hearing, and was argued by the U. S. attorney for the plaintiffs, and by Pierre Soulé, esq., for defendant, and was submitted to the court, and taken under advisement.

Opinion of the Court.—Filed 5th January, 1858.
U. S. Circuit Court.

UNITED STATES
vs.
WILLIAM WALKER.

The defendant in this case was arrested and held to bail in the sum of $2,000 to appear before this court, on the 17th day of November last, to answer to the charge of having set on foot a military expedition, to be carried on from this district against the Territories of Nicaragua and Costa Rica, with which the United States are at peace. On the day appointed for his examination upon this charge, he failed to appear; and the district attorney has moved that his recognizance be declared forfeited, and that judgment be entered up against his bail.

This motion is resisted by P. Soulé, esq., as the counsel of the defendant, upon the grounds: 1st. That in cases of misdemeanor a defendant may appear by counsel; and that he, as counsel of the defendant, Walker, having appeared, no judgment of forfeiture can legally be rendered; and 2d. That until there be a judgment of forfeiture entered up against the principal in the recognizance, the surety cannot be called upon to pay the penalty.

It is true that the courts of the United States, in the absence of legislation, are governed in their practice in criminal cases by the rules of the English common law.

It is equally true, that according to the rules of the common law a defendant in a case of misdemeanor might appear by counsel; but I am aware of no instance in this country, at least in the courts of the United States, where an appearance by counsel in a criminal cause has been considered sufficient. Bills of indictment may be preferred against an absent defendant, and the fact of his absence is no obstacle to the return of a true bill found against him by a grand jury. But no instance has been cited from criminal trials before the courts of the United States, wherein a trial was had upon an indictment against an absent defendant. Such a proceeding would be opposed to the whole spirit and policy of our laws; and, in my judgment, a violation of that provision of the federal Constitution, which declares that in all criminal proceedings the accused shall enjoy the right to a speedy and impartial trial by an impartial jury; and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

The tender consideration of our law for the rights of every person accused of an offence, the penalty of which is a deprivation of his liberty or property, forbids the idea that he could, while absent in a foreign land, enjoy fully his rights in securing an impar-

tial jury, in being confronted with the witnesses against him, and in having compulsory process for obtaining witnesses in his favor.

But even if this court could reconcile it with its ideas of law and justice to permit the defendant to waive all these rights, these conditional guaranties for his protection, and order the prosecution against him to proceed, it would certainly be deterred from such a course by the conviction that it would be doing an utterly vain thing. It would certainly refrain from permitting a prosecution to proceed against an offender, who, by his very absence far beyond the limits of its jurisdiction, could prevent the punishment which a conviction might demand. The learned counsel who represents the absent defendant has assured the court that he is authorized to declare, in behalf of his client, that in the event of a conviction that client will appear and submit to the penalty which the law prescribes. The authority of the learned counsel to make the declaration is not doubted; but the court may well doubt the sincerity of the defendant himself, in any declaration he may make of his willingness or intention to return and submit himself to its authority, while he is acting in total disregard of the letter and spirit of the recognizance, which was solemnly entered into in its presence, and which bound him to appear on an appointed day to answer the charge alleged against him. It bound him to appear on the 17th of November, "and from term to term thereafter until duly discharged, to answer to such complaint as may then and there be made against him on a charge of beginning, setting on foot, and preparing the means of a military expedition, within this district, against the territories of Nicaragua and Costa Rica, with whom the United States are at peace, in violation of the provisions of the act of Congress of April 20th, 1818." It furthermore bound him "not to depart without the leave of the court, and to comply with and abide by such judgment or sentence as may then and there be pronounced against him." This recognizance, thus solemnly entered into by the defendant, the court was authorized to receive, by the humanity of our laws, to save the defendant from imprisonment; and it would be strange if its plain and unequivocal language should now receive a construction which would change its own evident intent and meaning, and defeat the purposes of public justice.

It is therefore ordered and adjudged that the recognizance entered into by the defendant, Walker, be and the same is hereby declared forfeited.

And it is further ordered and adjudged that S. F. Slatter, the surety in the said recognizance, pay the sum of $2,000 with interest, at the rate of 6 per cent. per annum from this date until paid, together with the costs of this motion.

Judgment on Recognizance.

Judgment Docket.

Circuit Court of the United States, fifth circuit and eastern district of Louisiana.—November Term, A. D. 1857.

New Orleans, Tuesday, 5th January, 1858.

Court met pursuant to adjournment. Present, Hon. Theo. H. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

THE UNITED STATES
vs.
WILLIAM WALKER and S. F. SLATTER, his Surety. } 2,826.

The motion herein made on part of the prosecution, to have the recognizance of the defendant, William Walker, declared forfeited, and for judgment thereon, having been argued and submitted on a former day, and the court having considered the same, doth now order, adjudge and decree, that the said recognizance be and the same is declared forfeited, and that the United States do have and recover judgment against the said William Walker and his surety, F. S. Slatter, in solido, for the sum of two thousand dollars, the amount of the said recognizance, with interest thereon at the rate of six per cent. per annum from this date until paid, together with the costs on this motion.

Judgment rendered 5th January, 1858.

Judgment signed 20th January, 1858.

(Signed) THEO. H. McCALEB,
U. S. Judge.

Affidavit of S. Flatter.—Filed 9th Jan'y, 1858.

THE UNTED STATES
vs.
WILLIAM WALKER.

S. F. Slatter, being duly sworn, says that he has every reason to expect that, in less than thirty days, he will be able to surrender in court the person of Gen'l W. Walker, and thus enable the United States to go on with their proceedings against the said Gen'l Walker, and to bring his case to trial.

(Signed) S. F. SLATTER.

Sworn to and subscribed before me, this 7th Jan'y, 1858.
J. W. GURLEY, *Cl'k.*

Motion for Delay and Suspension of Judgment.

Minutes.—November Term, 1857.

New Orleans, Saturday, 9th January, 1858.

Court met pursuant to adjournment. Present, Hon. Theo. H.

McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

THE UNITED STATES
vs.
WILLIAM WALKER. } 2,826

Pierre Soulé, esq., attorney of S. F. Slatter, the surety upon the recognizance of the defendant, William Walker, this day moved the court that a delay of thirty days be granted to the said surety to produce the person of William Walker, in discharge of his recognizance, and that, in the mean time, the judgment entered against him be suspended, and filed in support of his motion, the affidavit of the said Slatter; whereupon it was ordered that the U. S. attorney be served with a copy of the application, and that the same be assigned for hearing for Saturday next, the 16th instant, at 10 o'clock a. m.

Argument and Submission of Motion.

Minutes.—November Term, 1857.

New Orleans, Monday, 18th January, 1858.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

THE UNITED STATES
vs.
WILLIAM WALKER and S. F. SLATTER, his Surety. } 2,826.

The motion herein made on behalf of S. F. Slatter, the surety upon the recognizance of the defendant, William Walker, on the 9th instant, having been assigned for hearing for this day, was argued by Pierre Soulé, esq., on part of the applicant, and by the U. S. att'y on part of the prosecution, and was submitted to the court, and was taken under advisement.

Opinion of the Court on Motion.—Filed 20th January, 1858.

U. S. Circuit Court.

UNITED STATES
vs.
WM. WALKER. }

The counsel for the defendant in this case had moved the court to suspend its judgment, condemning the surety in the recognizance to pay the penalty thereof, for thirty days. In support of the motion, he has introduced an affidavit of the said surety, showing that he has every reason to expect that, in less than thirty days, he will be able to surrender in court the person of Gen. Walker, and

thus enable the United States to go on with their proceedings against him, and to bring his case to trial.

The judgment of the court has not yet been signed; and I have no doubt of the power of the court over it until, according to our practice, it has been signed, and thus placed beyond its control.

The courts of the United States are governed in criminal proceedings by the rules of the common law, except where those rules have been changed or modified by the legislation of Congress. They have not only the right to declare a recognizance forfeited, but to enforce the payment of the penalty; and in this respect they possess the powers of both the court of oyer and terminer, and the court exchequer in England. In that country, a recognizance once declared forfeited by a court of oyer and terminer is estreated to the exchequer, where the amount of the penalty is collected as a debt due to the crown.

This court being possessed of full power not only to declare the forfeiture but to enforce the payment of the penalty of the recognizance, the question arises, has good and sufficient reason or cause been shown by the surety why the judgment already formerly rendered should be suspended?

It is not pretended that the defendant failed to appear before this court on the day fixed in the recognizance in consequence of any superior or overruling power. It is not shown that he did not wilfully leave the jurisdiction of the court, in violation of the express terms of his recognizance. There is, therefore, no ground upon which any legal or equitable discretion can be exercised by the court. It was the duty of the surety to have his principal in court on the day fixed by the recognizance. He failed to do so; and he has not shown any good reason why the judgment should not have been rendered against. And if the judgment was properly rendered against him, condemning him to pay the penalty of the forfeited recognizance, no reason has been shown why it should be suspended. The court is unwilling to lay down any rule which may serve as an unsafe precedent hereafter. It is unwilling to give any countenance to the idea that a party, who has been arrested for an offence against the laws of the United States, and released from imprisonment by solemnly entering into a recognizance to appear and answer the charge against him, can with impunity leave the jurisdiction of the court. It is unwilling, by its action in this case, to convey the idea that the obligations assumed by the surety are to be slightly regarded. It may be his misfortune, if he was in reality unable to produce the person of his surety on the day appointed; but he has brought to the knowledge of the court no fact which exempts him from the usual liability of sureties who become responsible for the appearance of their principals.

The motion must, therefore, be refused.

Judgment on Motion for Delay.

Minutes.—November Term, A. D. 1857.

New Orleans, Wednesday, 20th January, 1858.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

THE UNITED STATES
vs.
WILLIAM WALKER and S. F. SLATTER, his Surety. } 2,826.

The court having considered the application herein made on part of S. F. Slatter, the surety upon the recognizance of the defendant, William Walker, on the 9th instant, this day delivered its opinion in writing; and in conformity thereto doth now order that the same be refused.

Petition for Writ of Error.—Filed 23d January, 1858.

To the Hon'ble the Judges of the Circuit Court of the United States, in and for the fifth circuit, and holding sessions for the eastern district of Louisiana.

Gen. William Walker and S. F. Slatter defendants in the rule taken against them by the United States district attorney, in the case of the United States vs. William Walker, respectfully represent, that there is error in the judgment rendered against them in the said rule, by which they are decreed to pay to the United States the sum of two thousand dollars, with the interest which has accrued on the same since the 17th of November last.

And they now move, by their counsel undersigned, and pray for a writ of error to the Supreme Court of the United States, and that upon their giving bond and security, as this hon'ble court may direct, the execution of said judgment may be stayed; and as in duty bound, &c., &c.

(Signed) PIERRE SOULÉ,
Of Counsel for S. F. Slatter.

Order allowing Writ of Error.

Minutes.—November Term, A. D. 1857

New Orleans, Saturday, 23d January, 1858.

Court met pursuant to adjournment. Present, Hon. Theo. H. McCaleb, district judge; absent, Hon. J. A. Campbell, presiding judge.

THE UNITED STATES
vs.
WILLIAM WALKER and S. F. SLATTER, his Surety. } 2,826.

On motion of Pierre Soulé, esq., of counsel for defendants, and on presenting and filing petition, representing that they are aggrieved by the judgment herein rendered against them, and are informed and believe that there is error therein, to their prejudice, and praying a writ of error therefrom, returnable to the next term of the Supreme Court of the United States, the same to operate as a supersedeas, it is ordered that the same be allowed as prayed for, on defendants giving bond, conditioned according to law, with good and solvent surety thereon, in the penal sum of three thousand five hundred dollars.

Bond for Writ of Error.—Filed 23d January, 1858.

Know all men by these presents, that we, S. F. Slatter and Wm. Walker, as principals, and Wm. Son Terry, as surety, are held and firmly bound unto the United States of America in the full and just sum of three thousand five hundred dollars, to be paid to the said United States of America, their certain attorney or assigns: To which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 23d day of January, in the year of our Lord one thousand eight hundred and fifty-eight.

Whereas lately at a circuit court of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana, at New Orleans, in a suit or proceeding depending in said circuit court, wherein the United States of America were plaintiffs and William Walker and S. F. Slatter were defendants, judgment was rendered against the said W. Walker and S. F. Slatter, defendants, and the said William Walker and S. F. Slatter having obtained a writ of error, and filed a copy thereof in the clerk's office of the said circuit court, to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, the first Monday of December next:

Now the condition of the above obligation is such, that if the said William Walker and S. F. Slatter shall prosecute their writ to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) S. F. SLATTER, [SEAL.]
WM. SON TERRY, [SEAL.]

United States of America, Circuit Court of the United States, fifth circuit and eastern district of Louisiana.

CLERK'S OFFICE.

I, John W. Gurley, clerk of the circuit court of the United

States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 19 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had in the case of The United States vs. William Walker and S. F. Slatter, No. 2,826 of the docket, so far as the same now remain of record or on file in said court.

Witness my hand and the seal of said court, at the city of New Orleans, this first day of April, A. D. 1858.

J. W. GURLEY, *Clerk.*

Writ of Error.

UNITED STATES OF AMERICA, *ss.*

The President of the United States to the honorable the Judges of the Circuit Court of the United States, in and for the fifth circuit, and holding sessions for the eastern district of Louisiana, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or one of you, between the United States of America and William Walker and S. F. Slatter, a manifest error hath happened, to the great damage of the said William Walker and S. F. Slatter, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Roger B. Taney, Chief Justice of the said Supreme Court of the United States, this 23d of January, in the year of our Lord one thousand eight hundred and fifty-eight.

J. W. GURLEY,
Clerk of the United States Circuit Court for eastern district of Louisiana.

Filed 23 Jan'y, 1858.

J. W. GURLEY, *Cl'k.*

Citation in Error.

THE UNITED STATES OF AMERICA.

The President of the United States to the United States of America, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, for the fifth circuit and eastern district of Louisiana, wherein William Walker and S. F. Slatter are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this twenty-third day of January, in the year of our Lord one thousand eight hundred and fifty-eight.

THEO. H. McCALEB,
U. S. Judge.

Marshal's Return.

Rec'd January 23d, '58; and on the same day served copy of the within citation in error on Thomas J. Semmes, U. S. district attorney, in person, in the city of New Orleans, and returned same day.

EMILE MARY, *Dy. Marshal.*

Filed 21 Dec'r, 1858.

In the Supreme Court of the United States.

DECEMBER TERM, 1866.

WALKER and SLATTER,
vs.
UNITED STATES. } No. 4.

STATEMENT AND ARGUMENT FOR UNITED STATES.

HENRY STANBERY,
Attorney General.
J. HUBLEY ASHTON,
Asst. Attorney General.

6/8

In the Supreme Court of the United States.

DECEMBER TERM, 1866.

WILLIAM WALKER and S. F. SLATTER, plaintiffs in error, *vs.* THE UNITED STATES. } No. 4.

STATEMENT AND ARGUMENT FOR UNITED STATES.

Walker was arrested, under warrant of the district court at New Orleans, on a charge of having set on foot a military expedition against the territories of Nicaragua and Costa Rica, in violation of the 6th section of the act of April 20, 1818, which declares such offense a high misdemeanor, punishable by fine not exceeding three thousand dollars, *and* imprisonment for not more than three years, (3 Stats., 417.) He was brought into court November 11, 1857, and entered into a recognizance in the sum of $2,000, subject to the following condition: "that if he, the said principal, William Walker, shall appear before this court on Tuesday, the 17th of November, instant, at 10 o'clock a. m., and from day to day, and from term to term, thereafter, until duly discharged, to answer to such complaint as may then and there be made against him on a charge of beginning, setting on foot, and preparing, within the United States, a military expedition, &c., and shall not depart without leave of the court, and shall comply with and abide by such judgment or sentence as may then and there be pronounced against him, then," &c., (Rec., p. 3.)

On the day mentioned in the recognizance, November 17, 1857, Walker failed to appear in court in person, and his attorney and counsel claimed the right to represent and appear for him in answer to his recognizance. The district attorney then moved that the recognizance be declared forfeited, and that judgment be entered thereon, which was granted. And on January 5, 1858, the court, after due proclamation, rendered judgment against Walker and surety, in soledo, for $2,000, with interest thereon at the rate of six per cent. per annum from date until paid. The judgment not having been signed, on January 9 the counsel of the surety moved the court that the judgment be suspended for thirty days, with a view to the production of the body of the party in discharge of the recognizance. This motion the court refused, and on January 12, 1858, signed the judgment.

On January 23, 1858, a writ of error was sued out by the defendants in the judgment.

The record contains the opinions of the district judge on the several motions of the United States Attorney and the counsel of the surety. (Rec., pp. 5 and 9.) The views expressed by the learned judge as to the nature and legal effect of the obligation of the principal and surety in such a recognizance as this, and as to the law and practice of the courts of the United States touching the appearance of defendants in cases of criminal prosecution, are, perhaps, sufficient to induce an affirmance of the judgment; but, in addition to the arguments contained in those opinions, we submit the following observations:

First. In theory and contemplation of law, a man's

bail are jailors of his own choosing, and the obligation they assume is to as effectually secure his appearance and put him as much under the power of the court as if he had been in the custody of the proper officer. (Hawkins' Pleas of the Crown, B'k 2, ch. 16, sec. 84; 1 Bacon's Abr., 597; Petersdorff on Bail, 515.) In *The Queen v. Lord Drummond*, (11 Modern, 200,) the defendant stood bound by recognizance to appear in the Queen's Bench the first day of Hilary term. "Sir Simon Harcourt, excusing his appearance by reason of sickness, moved that his recognizance might be discharged. The Attorney General consented thereto. But Holt, *Chief Justice*, said, notwithstanding such consent, my Lord Drummond not *appearing in person*, the court could not discharge the recognizance. But said they could respite it until the next term." In the case of *the Queen v. Ridpath*, (10 Modern, 152,) the defendant had entered into a recognizance with securities whereby he was bound to appear the first day of the term, *ad respondendum*, &c., and, in the mean time, not to depart without the license of the court. The defendant appeared on the first day of the term to an information which was subsequently dismissed by the Attorney General, but failed to appear to a second information preferred on the last day of the term. The court held that he was bound to appear to the second information, and the recognizance was forfeited.

The case implies that the appearance required was a personal one.

In the case of Commonwealth *v.* McNeill, (19 Pick., 143,) the supreme court of Massachusetts held that

"*from the nature of the obligation, and on the authorities and practice,*" a defendant held to bail to answer at court, on a day certain, a charge of crime punishable by imprisonment, was bound to appear personally, and to remain until discharged, and that default of personal appearance was a forfeiture of the recognizance.

The People *v.* Stager, 10 Wendell, 431.

Second. The terms of this recognizance import a personal appearance as strongly as if the condition expressly obligated the defendant to appear in person.

The offense with which he was charged was punishable absolutely by imprisonment. The statute does not invest the court with any discretion, except as to the amount of the fine to be imposed. This fact is of controlling importance in construing the recognizance with the view of determining the precise contract which the surety made. If, in the case of an offense punishable only by fine, or by fine *or* imprisonment at the discretion of the court, the court has power to waive the personal appearance of the party, and to allow him to appear by counsel when the recognizance does not expressly bind him to appear in person—a doctrine, however, opposed to all authority and practice—the court, in the case of such an offense as this, under the condition of such a recognizance as this, has no authority to exercise any similar discretion.

The condition in this recognizance obliged the defendant to appear on November 17, and not to depart without leave of the court; importing, as fully and strongly as if it had been expressed, corporal presence and personal appearance.

In Rex *vs.* Hann & Price, (3 Burrow's Rep., 1786,) a motion was made for a rule to dispense with the personal appearance of defendants in a criminal information, on the undertaking of their clerk in court to answer for their fines. The court refused the motion. The report continues: "The general doctrine laid down by the court, and agreed by the counsel on both sides, was that, though such a motion was subject to the discretion of the court, either to grant or to refuse it, when it was *clear and certain* that the punishment *would* not be *corporal*, yet it ought to be denied in every case where it was either *probable* or *possible* that the punishment *would* be *corporal*." Here no recognizance was in question. The reasoning, however, applies, if at all, *a fortiori*, to the case of a recognizance.

Third. But if the obligation in question be placed upon the lowest footing, which is that the motion made by the counsel for the accused in this case was subject to the discretion of the court to grant or refuse it, no writ of error will lie on the decision of the court refusing to exercise its discretion in favor of the accused.

Morsell *v.* Hall, 13 How., 215.
Evans *v.* Phillips, 4. Wh., 73.
Young *v.* Black, 7 Cranch, 565.

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